COMPANY APPEAL(SJ) No.1 OF 1998

In the matter of an appeal under Section 10F of the Companies Act, 1956, against the judgment and order dated 30th April, 1998 passed by the Company Law Board, Principal Bench, New Delhi in Company Petition No. 17 of 1993.

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1. Bihar.State Industrial Development Corporation Limited, a Government of Bihar Company having its registered Office at Indira Bhawan, Ram Charitra Singh Path, Patna-800001 under P.S. Shri Krishna Puri in the town and district of Patna
2. Magadh Spun Pipe Limited, a Joint Venture Company promoted by Bihar State Industrial Development Corporation Limited having its registered Office at Indira Bhawan, Ramcharitra Singh Patn under P.S. Shri Krishna Puri in the town and district of Patna.

…… Opposite Parties ---------Appellants

Versus

1. Company Law Board, Principal Bench having its Office at 5th Floor, 'A' Wing, Shashtri Bhawan, Dr. Rajendra Prasad Road, New Delhi- 110001
2. Banford Investment Limited, 12 Old Post Office Street, Calcutta-700001
3. Sancheti Food Products Limited, 12 Old Post Office Street, Calcutta- 700001
4. Shri Mohan Lal Sancheti, 12 Old Post Office Street, Calcutta-700001, and
5. Shri Rohit Sancheti, 12 Old Post Office Street, Calcutta-700001

Applicants ----------Respondents

For the Appellants : M/S. Umesh Prasad Singh, Sr. Advocate and Rajeev Ranjan Prasad, Advocate

For The Respondents : M/S. Nilotpal Ganguli and Anand Priyadarshi, Advocates

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P R E S E N T

THE HON'BLE MR. JUSTICE RAMESH KUMAR DATTA

R.K.Datta, J. Heard learned counsels for the appellants and for respondent nos. 2 to 5.

2. The appellants have come to this Court against the judgment and order dated 30.4.1998 of the Company Law Board, Principal Bench, New Delhi passed in Company Petition No. 17/1993. By the said order the Company Law Board has held that the petitioners therein (respondent nos. 2 to 5) are well within their right to maintain a petition under Section 399 and the petition is maintainable.

3. The facts of this case are that the appellant no.2, Magadh Spun Pipe Limited was incorporated as a Public Limited Company on 21.1.1985 having been promoted by the appellant no.1, Bihar State Industries Development Corporation Limited (BSIDC) with the co-promoter being Shri Pradip Sancheti. A Joint Venture Agreement dated 29.10.1994 for a period of 10 years was entered between the parties, the object of which was to take over the assets purchased by the BSIDC in a liquidation proceeding of the Gayday Iron & Steel Company Limited and to commission the factory so purchased by BSIDC into production. It is the case of the appellants that although both the co-promoters had nominated three Directors each to the Board of Directors of the Company but day to day control of the affairs of the company including financial matters rested in the hands of Shri P. Sancheti and Shri V.S. Bharaktiya (nominee and father-in-law of Shri

P.Sancheti) who were appointed in the first meeting of the Board of Directors of MSPL held on 15.3.1985 as Executive Director and Managing Director respectively. They being the only whole time Directors of the Company continued to exercise exclusive control over the day to day management and control of the affairs of the Company from 15.3.1985 to 2.12.1991.

4. The total paid up capital of the Company was Rs. 2.5 crores and equity shares to the tune of Rs. 1,22,50,000/- were issued to the public in February, 1986. In addition, the Industrial Reconstruction Bank of India (which was subsequently renamed as Industrial Investment Bank of India) sanctioned a term loan of Rs. 1.22 crores out of which Rs. 1.07 crores was disbursed. It is alleged by the appellants that Shri Sancheti and Shri Bharaktiya criminally misappropriated bulk of the share capital and the term loan to the tune of Rs. 3,13,52,990/- for which in the year 1992 the BSIDC and MSPL filed criminal case in the Court of the Chief Judicial Magistrate, Patna in which cognizance has been taken and the criminal proceedings are pending in the Court of Judicial Magistrate. It is the further case of the appellants that in 1990 there were serious allegations of misappropriation of funds and gross mismanagement of the affairs of the company against each other by the two whole-time directors as a result of which

the Board of Directors appointed M/s. Mitra Kundu and Basu, a reputed firm of Chartered Accountants of Kolkatta to conduct an special audit into the affairs of MSPL. In their report it was found that there was gross mismanagement and misappropriation of Company's money and assets by both the Executive Director and the Managing Director. It was also found that instead of contributing in cash the promoters share of the capital, they had made fictitious and imaginary credit adjustments to the extent of nearly Rs. 30 lacs to show contribution to the Equity Capital of the Company. Company Petition No. 61/1992 was filed under Section 398 of the Companies Act by the appellant no.1 before the Company Law Board, Principal Bench, New Delhi against Magadh Spun Pipe Ltd., Shri Pradeep Sancheti and Shri V.S. Bharaktiya and ultimately by order dated 24.8.1993, the Company Law Board dismissed the said petition holding that no case is made out for intervention at that stage by using discretionary powers under Section 398 of the Companies Act, taking into consideration the pendency of various court cases between the parties, orders issued by various Courts and action already taken and alternative remedies pursued in respect of matters on which prayers were made before them.

5. Respondent Nos. 2 to 5 also filed Company Petition

No. 17/1993 before the Company Law Board, Principal Bench, New Delhi under Sections 398 and 402 of the Companies Act. In the said Company petition the respondents claimed to hold 10% of the equity share capital of the company and further stated that they had made full payment for purchase of those shares through account payee cheques on scheduled commercial banks and holding those shares since the last 5 years or more. It was stated in the said petition that the private promoters made efforts and the plant was even prepared for trial production which was carried out in 1986. It was further stated that the State Electricity Board disconnected the power lines as a result of which the production could not be started. It is further stated that the same was due to non-release of the working capital. Ultimately during the year 1989-90 with the poor law and order situation at the factory with several assaults, thefts and dacoities and non-payment of wages and salaries to the employees the then M.D. handed over the charge to BSIDC. The BSIDC failed to comply with their obligations and in order to cover up their misdeeds, has indulged in victimization of the promoters including initiating unwarranted criminal proceedings. As many as ten litigations within the knowledge of the petitioners were registered. It was further contended that due to disputes amongst the promoters, the

shareholders should not suffer even though the petitioners invested at the behest and request of the promoters but their rights are distinctly different and has to be protected.

6. The appellants in their reply to the company petition took the stand that the names of the petitioners were not to be found in the Register of members maintained by the company and thus they were not shareholders and could not maintain the petition in question. It was pointed out that these petitioners were associates of Shri Pradeep Sancheti, the private co-promoter. Under the Joint Venture Agreement the private promoter was required to contribute 25% of the equity shares and the petitioners claimed to hold along with said Pradeep Sancheti 25% and more of the equity shares of the company and not on their own. It was further pointed out that the petitioners had no independent existence apart from their said co-promoter. It was stated that in view of the special audit conducted by the aforesaid Chartered Accountant it was established that the private promoters including these petitioners had not contributed to the equity shares as claimed by them rather false, fictitious and imaginary credit entries were made in their favour even before the issue of the prospectus by the company. Accordingly, it was prayed by the appellants that firstly genuineness of the claim of the petitioners

to hold more than 10% equity shares of the company had to be determined before any other issue was taken up.

7. The petitioners in reply to the aforesaid stand reiterated that they had paid the entire share application money by account payee cheques and their names appear in the share allotment register filed with the Registrar of Companies. They also relied upon the return of allotment produced from the registrars and Computer agent M/s. Datamatics , Bombay. It was alleged that the Secretary of BSIDC along with Shri P.K.Sharma had destroyed all the statutory records and possibly built up fresh share registers without the names of the petitioners and their associates. They also produced original share certificates before the Company Law Board.

8. After hearing the parties on the preliminary issue, the Company Law Board held the petition as maintainable.

9. Learned counsel for the appellants submits that the main issue which had been raised by them before the Company Law Board has not been answered categorically and no finding has been recorded as to the exact number and value of shares held by the petitioners-respondents and only in a vague manner it has been held that they are entitled to maintain the petition.

10. In this regard learned counsel relies upon the

definition of 'member' as contained in Section 41 of the Companies Act which is in the following terms:-

> "41. Definition of "member".-
>
> (1) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration, shall be entered as members in its register of members.
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> (2) Every other person who agrees in writing to become a member of a company and whose name is entered in its register of members shall be a member of the company.
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> (3) Every person holding equity share capital of a company and whose name is entered as beneficial owner in the records of the depository shall be deemed to be a member of the concerned company."

11. He also refers to Section 150 of the Act relating to maintenance of register of members which is in the following terms:-

> "150. Register of members.-
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> (1) Every company shall keep in one or more books a register of its members, and enter therein the following particulars:-
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> (a) the name and address and the occupation, if any, of each member,

(b) in the case of a company having a share capital, the shares held by each member distinguishing each share by its number except where such shares are held with a depository and the amount paid or agreed to be considered as paid on those shares;

(c) the date at which each person was entered in the register as a member; and

(d) the date at which any person ceased to be a member:

Provided that where the company has converted any of its shares into stock and given notice of the conversion to the Registrar, the register shall show the amount of stock held by each of the members concerned instead of the shares so converted which were previously held by him.

(2) If default is made in complying with sub-section (1), the company and every officer of the company who is in default, shall be punishable with fine which may extend to five hundred rupees for every day during which the default continues."

12. On the strength of the aforesaid provisions, learned

counsel contends that in order to be considered as a member of the company a person must agree in writing to become a member of the company and his name should also be entered in the register of members. It is urged that once the contention was raised on behalf of the appellants that the petitioners before the CLB were not the holders at least of 1/10th of the issued share capital of the company then the burden lay upon the respondent nos. 2 to 5 to show that they had agreed in writing to become members of the company and further that their names appear in the register of members. On both the counts, it is urged that the respondents have failed as no such evidence was or could have been brought on the record by them since as a matter of fact, their names did not appear in the register of members of the company. In support of the aforesaid proposition learned counsel relies upon a decision of the Supreme Court in the case of Balkrishna Gupta and others Vs. Swadeshi Polytex Ltd and others: (1985) 58 Company Cases 563, at page 577 of which it has been held as follows:

> "It is clear from the relevant provisions of the Act which are referred to hereafter that a member can participate and exercise his vote at a meeting of a company in accordance with the Act

and the articles of association of the company. Section 41 of the Act defines the expression “member” of a company. The subscribers to the memorandum of association of a company shall be deemed to have agreed to become members of the company and on its registration shall be entered as members in its register of members. A subscriber to the memorandum is liable as the holder of shares which he has undertaken to subscribe for. Any other person who agrees to become a member of a company and whose name is entered in its register of members shall be a member of the company. In his case, the two conditions, namely, that there is an agreement to become a member and that his name is entered in the register of members of the company are cumulative. Both the conditions have to be satisfied to enable him to exercise the rights of a member. Subject to S. 42 of the Act, a company or a body corporate may also become a member. When once a person becomes a member, he is entitled to exercise all the rights of a member until he ceases to be a member in accordance with the

provisions of the Act…..”

13. He also relies upon a decision of a learned Single Judge of the Kerala High Court in the case of Lalithamba Bai Vs. Harrisons Malayalam Ltd. and another: (1988) 63 Company Cases 662, at page 666 of which it has been held as follows:-

> “Section 41 of the Companies Act gives the definition of a member. It includes the subscribers to the memorandum of a company and every other person who agrees in writing to become a member of the company and whose name is entered in its register of members. In the case of members other than subscribers to the memorandum, two essential conditions have to be satisfied to constitute a person as a member: (1) An agreement in writing to become a member, and (2) an entry on the register. These two conditions are cumulative. Both these conditions have to be satisfied and if both these conditions are not satisfied, the person in question cannot claim the status of a member. The position in the English Act is also almost identical.”

14. It is further submitted by learned counsel that in

view of the aforesaid position of law, it was incumbent upon the respondents to show that they were the share holders holding 1/10th of the shares of the company as required under Section 399 of the Companies Act before they would be eligible to file a company petition under Section 398 of the Act. It is urged that they had woefully failed in showing that they satisfied either of the two requirements and mere production of alleged share certificate in original could not be considered sufficient as nothing is to be found in the order regarding the distinctive share numbers which had been produced and the value of the shares underlying the share certificates. Thus, it could not be said that they were holders of 1/10th of the issued equity shares.

15. Learned counsel further submits that once it was evident that the names of the petitioners or names of the respondents did not appear in the register of members, then the only remedy open to them was to approach the competent forum for getting the register of share holders rectified first and only if such application was allowed on their being able to satisfy the competent forum and the register rectified, then any right accrue in their favour to maintain a petition under Section 398. In support of the said proposition, learned counsel relies upon a decision of the Punjab High Court in the case of Ved Prakash and

others Vs. Iron Traders (Private) Ltd. and others: AIR 1960 Punjab 427, in para-7 of which it has been held as follows:-

> "7. From this it would appear that in fact the petitioners having already had their application for rectification of the register dismissed by the learned District Judge and not having filed a suit to establish their rights as advised by him, are now seeking the same relief under the guise of an application under Ss. 397 and 398 of the Act. The learned counsel for the petitioners was unable to cite any case in which such a course had been permitted, and in my opinion he will never be able to do so, since I consider that a petition under Ss. 397 and 398 can only be maintained by a person or persons who are shown as members in the register of the Company, and if the persons who wish to file such a petition are not shown as members rightly or wrongly they must first have the register rectified before they can bring a petition. I accordingly uphold the objection embedied in first of the preliminary issues and do not consider it is necessary to go into the second. I accordingly dismiss the

petition with costs to respondents Nos. 1 to 4. Counsel's fee Rs. 100/-. Petition dismissed."

16. In this regard learned counsel further refers to the report of the special audit team of M/s. Mitra Kundu and Basu, Chartered Accountant constituted by Board of Directors of the Company. In that regard, it is stated as follows:-

"Details of contribution made by the promoter and the manner in which the same were brought into the Company are furnished in the Annexure.

Salient feature of the same are briefly outlined in the following:-

Considerations for the following 'Share Money' arose purely out of effecting the adjustment entries. We have been given to understand that the creditors of the company/ other parties were paid off earlier by the proposed shareholders and hence, those sum of money were subsequently, treated as consideration sum for allotment of shares to them. The procedure adopted in this regard appears tobe tenable provided the base

entries i.e. the bona fide of creditors/ other parties' a/c are proper and genuine. Here, it was not so. The creditors/other parties a/c which were squared off to represent consideration sum for shares are fictitious and imaginary as would be evident from the remarks made else where in our report. Moreover, no acknowledgement from the original party was found establishing the fact that they were paid off by the third party (proposed shareholder) on behalf of the company. Further no prior agreement/arrangement to the effect of this deal was there.

In the light of the above, the consideration sum for shares as shown to have been contributed by way of cash/bank does not purport to be a bona fide one."

17. Learned counsel also contends that in the facts and circumstances of the case, the so called share certificates produced by the respondent nos. 2 to 5 ought not to have been given any credence considering the manner in which the company was run by the private co-promoters during those first six years

while they were incharge and the manner in which the share certificates were being issued. In this regard learned counsel points out that hundreds of blank share certificates of equity shares of the company were discovered which were duly signed by the Chairman and the Managing Director; such blank share certificates were also produced before the Company Law Board and photo copies of seven such certificates have also been brought as Annexures before this Court by way of supplementary affidavit to show the manner in which the equity share certificates were being issued. It is urged by learned counsel that under the said background the Company Law Board ought to have carefully considered those so called original share certificates produced by respondent nos. 2 to 5 with due suspicion and not relied upon them until the respondents could have satisfied the proper forum and got the register of members rectified in accordance with law.

18. Learned counsel submits that it has been wrongly held in the concluding part of the impugned order that notices of annual general meeting were sent to all the petitioners in respect of the AGM relating to the years ending 31st March, 1991 and 31st March, 1992 whereas it had itself in the earlier part of the order taken note of the fact that such notices were sent only to two of the petitioners and further the names of the two petitioners were

found in the annual returns filed before the Registrar of the Companies but as a matter of fact it was found that the total shareholding of two of the petitioners, namely, respondent nos. 4 and 5 did not comprise 1/10th of the paid up capital of the company. It is urged by learned counsel that having found as a fact that respondent nos. 4 and 5 did not have sufficient shares to make them qualified as holding 1/10th equity shares of the company, yet the CLB wrongly recorded the conclusion that all the four respondent nos. 2 to 5 were treated as members of the Company by issuing notices of annual general meeting to them.

19. Learned counsel urges that proceedings under Section 398 of the Companies Act are a serious matter and should not be lightly entertained. The applicants must show that they are making the same bona fide. In the present matter, it is urged by him that the bona fides were completely lacking and the petitioners were mere front-men of Shri Pradeep Sancheti who had indulged in massive manipulations and misappropriation of the funds of the company and against whom several legal proceedings including criminal proceedings had been instituted. Under such circumstances any such petition on his behalf ought not to have been entertained. In support of the said proposition learned counsel relies upon a decision of the Karnataka High

Court in the case of Srikanta Datta Narasimharaja Wadiyar Vs. Sri Venkateswara Real Estate Enterprises (Pvt.) Ltd. and others: (1991) 72 Company Cases 211, at page 231 of which it has been held as follows:-

> "A consideration of all these legal issues will necessarily take me to the detailed objections filed by the respondents. But the question is whether, on the facts of these cases, this Court should go into the objections and determine the issues for consideration on merits. In my considered view, this petition could be disposed of on the preliminary issue, viz, whether the petitioner has filed the petition in good faith in order to work out his rights within the framework of the Act. It is well settled that the relief under Sections 397 and 398 of the Act is an equitable relief which is entirely left to the discretion of the company Court. In the fifth edition of Pennington's Company Law, dealing with relief from acts of oppression, it is stated (at page 750):
>
> " A petition for relief from oppression under the original statutory provision would be dismissed if it was not

presented in good faith solely in order to obtain such relief, and because of the equitable and therefore, discretionary character of the Court's jurisdiction under both the oral and the present provision, the requirement of good faith on the part of the petitioner undoubtedly continues. Thus, even if the Directors of the majority shareholders have been guilty of improper or irregular conduct, so that there is a prima facie case for relief, if will be refused if the real purpose of the petitioner is to obtain payment of debt owed by the company, or to force the Directors to accept his views as to the way in which the company's business should be managed; or if the petitioner has submitted to the conduct complained of without protest and has acquiesced in the improper management of the company affairs. Likewise, delay by the petitioner in initiating proceedings after he must have realized that he was the victim of a scheme of oppression or unfair treatment will induce the court to refuse relief, because this indicates that the petitioner has acquiesced in the respondents' conduct and that his

complaint is, therefore, not made in good faith."

It should be noticed that, in English law, there is no provision which is similar to comparable to Section 398 of the Act. But Section 397 of the Act is present in the English Act in a slightly different form. In the 1985 Act, the word "oppression" is substituted by the words "unfairly prejudicial". The principles applicable for granting relief against oppression under the English Act are equally applicable to Indian conditions since it is well settled that the Company Court constituted under the Act is also conferred with equity jurisdiction and, therefore, the principles applicable for granting reliefs against oppression under Section 397 would be applicable to the grant of relief under Section 398. But, it should also be noted that the Court's power to exercise jurisdiction under Section 397 or, for that matter, under Section 398 cannot be defeated by mere technicalities, as observed by the Supreme Court in Needle Industries (India) Limited V. Needle Industries Newey (India) Holding Ltd. [1981] 51

Comp Cas 743; AIR 1981 SC 1298."

20. Learned counsel also refers to the fact that the CLB ought to have applied the same standard in the matter of considering the company petition under Section 398 filed by the appellants to the company petition filed by respondent nos. 2 to 5. It is pointed out that the company petition filed by the respondent nos. 2 to 5 in 1993 as the front men of Pradeep Sancheti, was a counter blast to the company petition filed under Section 398 by the appellants in 1992, but the company petition filed by the appellants was dismissed on the ground of pendency of various court cases between the parties, orders issued by various Courts and action already taken and alternative remedies pursued in respect of matters on which prayers were made before them taking which into consideration the Company Law Board held that according to them, no case is made out for their intervention at that stage by using power under Section 398 of the Companies Act and therefore the petition was dismissed. However, the same standard was not applied to the company petition under Section 398 instituted at the behest of Pradeep Sancheti by respondent nos. 2 to 5 and it was decided to proceed in the matter. Learned counsel points out that even one of the members of the Bench

was common in both the orders and thus application of two standards is wholly unjustified. Moreso, when the main appellant is a Public Sector Undertaking of the Government of Bihar, while the respondent no. 2 to 5 are admittedly investors solely at the behest and request of the promoter Shri Pradeep Sancheti against whom serious allegations have been made earlier. It is submitted that the very entertainment of such an application goes against the purpose for which Section 398 of the Companies Act has been enacted.

21. Learned counsel for respondent nos. 2 to 5 on the other hand has sought to support the order of the Company Law Board. Learned counsel has taken me to the various paragraphs of the impugned order in which the contention of respondents has been considered. It is submitted by learned counsel that the Company Law Board has rightly taken into account the annual returns filed by the company before the Registrar of Companies in which the respondent nos. 4 and 5 have been shown as members. In this regard he refers to Section 164 of the Act which provides as follows:-

> "164. Registers, etc., to be evidence. – The register of members, the register of debentures – holders, and the annual returns, certificates and statements

> referred to in Section 159, 160 and 161 shall be prima facie evidence of any matters directed or authorized to be inserted therein by this Act."

22. It is further submitted by learned counsel that the original share certificates produced by the respondents have rightly been relied upon by the Company Law Board in view of Section 84(1) of the Act which provides as follows:

> "84. Certificate of shares.-
> (1) A certificate, under the common seal of the company, specifying any shares held by any member, shall be prima facie evidence of the title of the member to such shares.
> ……. ……."

23. On the basis of the aforesaid provisions, learned counsel submits that the submission of annual returns showing respondent nos. 4 and 5 as members are prima facie evidence of the said fact in terms of Section 164 and the original share certificates produced by them were also prima facie evidence of the title of the respondents to those shares. It is thus contended by him that in terms of the provisions of the Act, the Company Law Board has rightly relied upon those evidence in favour of these

respondents.

24. Learned counsel also relies upon Section 2(27) of the Act which is in the following terms:-

> "2(27). "member", in relation to a company, does not include a bearer of a share warrant of the company issued in pursuance of section 114;"

25. It is submitted by learned counsel that the definition of "member" is to be found in the said Section 2(27) and not in Section 41 of the Act which does not have any purport. Learned counsel relies upon a decision of the Karnataka High Court in the case of Srikanta Datta Narasimharaja Wadiyar Vs. Venkateswara Real Estate Enterprises (Pvt.) Ltd and others: (1990) 68 Company Cases 216 in which it was held that a petition for relief from oppression and mismanagement filed under Sections 397 and 398 of the Companies Act, 1956 is not to be thrown out on the sole ground that the petitioner's name is not found in the register of members. If in a given case, it is shown that he had been treated as a member by the company, the company court can always exercise its equity jurisdiction and the Court should not decline to exercise its equity jurisdiction on the ground of mere technicality.

26. Learned counsel also submits that what is to be seen in an application under Sections 397 and 398 of the Companies Act, is whether there is substantial compliance with the requirement by holding 1/10th of the shares and that having been done in the present matter, the Company Law Board rightly took the same into consideration. In support of the said stand learned counsel relied upon a decision of the Supreme Court in the case of J.P.Srivastava and Sons Pvt. Ltd. and others Vs. Gwalior Sugar Co. Ltd. and others: (2004) 122 Company Cases 596, at page 716 of which it has been held as follows:

"The object of prescribing a qualifying percentage of shares in petitioners and their supporters to file petitions under sections 397 and 398 is clearly to ensure that frivolous litigation is not indulged in by persons who have no real stake in the company. However it is of interest that the English Companies Act contains no such limitation. What is required in these matters is a broad commonsense approach. If the court is satisfied that the petitioners represent a body of shareholders holding the requisite percentage, it can assume that the involvement of the company in litigation is not lightly done and that it

should pass orders to bring to an end the matters complained of and not reject it on a technical requirement. Substance must take precedence over form. Of course, there are some rules which are vital and go to the root of the matter which cannot be broken. There are others where non-compliance may be condoned or dispensed with. In the latter case, the rule is merely directory provided there is substantial compliance with the rules read as a whole and no prejudice is caused. (See: Pratap Singh V. Shri Krishna Gupta, AIR 1956 SC 140) In our judgment, section 399(3) and regulation 18 have been substantially complied with in this case."

27. I have considered the rival submissions of the parties. From a perusal of the order of the Company Law Board it is to be found that essentially the challenge was to the petitioner-respondent nos. 2 to 5 not being holders of 10% of the issued equity share capital of the company, yet I do not find any specific finding having been recorded by the Company Law Board in this regard. The entire matter has been dealt with in a vague and general manner on the basis of conjectures and surmises. There is

absolutely no mention even of the fact as to the distinctive numbers and the value of the original share certificates which had been produced before the Company Law Board. The only reason for coming to such conclusion of holding at least 10% share is that out of the total share capital of the company, the co-promoters were required to contribute 25% of the shares and since the same is shown to have been contributed by the private promoters hence, it was presumed that the petitioners were holding at least 10% shares. First of all, the respondent nos. 2 to 5, although they formed part of the co-promoters group but admittedly they had not taken up the entire shares which was to be subscribed by the co-promoters, hence even if for the sake of argument, it is assumed that the co-promoters had, as a matter of fact, and not merely by a paper transaction taken up 25% of the share holding in the company, it does not automatically follow that the respondent nos. 2 to 5 had also made subscription to at least 10% of the shareholding of the company. There had to be specific finding in this regard before any such conclusion could have been drawn by the Company Law Board.

28. Moreover, I find that the Company Law Board has relied upon the judgment in Srikant Dutta Narasimha Raja Wadiyar's case (supra) relied upon by the respondents under

which if the person has been treated as a member of the company then the Company Court can exercise its jurisdiction in his favour. Even on this point treatment as a member of the company would be confined only to respondent nos. 4 and 5, with respect to whom it was found that their names figure in the annual returns filed by the appellant company before the Registrar of Companies and further that they have been issued notices of two annual general meetings. There being no such finding with respect to respondent nos. 2 and 3 and further there being a specific finding that the respondent nos. 4 and 5 did not qualify as holding 1/10th share capital, this Court fails to understand as to how even by relying upon the said decision the Company Law Board could have arrived at a conclusion that the petitioners had succeeded in showing that they were holding 10% equity shares and entitled to maintain a petition under Section 398 before it.

29. This Court is also of the view that the term member has been defined by Section 41, specifically by sub-section (2) thereof and not by Section 2(27) which merely provides that the expression “member” does not include a bearer of a share warrant of the company and thus excludes the said category of persons from the definition of member in section 141 where it is provided that in order to be recorded as member of the

company the person must agree in writing to be a member and his name should also find place in the register of members. It is evident from the records that the names of none of the respondent nos. 2 to 5 find place in the register of companies. If they were entitled on the basis of materials in their possession to be recorded as members in the register of members maintained by the company but had not been so recorded, then they ought to have proceeded to have got their names recorded in the register of members and only then on being able to show that they were holders of at least 1/10th share capital of the company, they could maintain a petition under Sections 397 and 398 of the Act. In this regard I am in agreement with the view of the learned Single Judge of Punjab High Court in Ved Prakash's case (supra) in which it was rightly held that an application under Sections 397 and 398 of the Act can only be maintained by a person who is shown as member in the register of the company.

30. The decision of the Supreme Court in the case of J.P.Srivastava (supra) does not at all support the stand of the petitioners as in that case it was clearly found on the basis of the materials on the record that the petitioners were holders of shares and there were only issues with regard to trust, etc. involved and it was in such circumstance that the said observations were made.

Those observations could not be used particularly in the present matter where serious allegations exist against the private co-promoters whose front-men evidently the respondent nos. 2 to 5 are; rather various litigations and criminal cases against the said private co-promoters are also pending in the courts. In such circumstance, no benefit could have been granted to the respondent nos. 2 to 5 by a liberal approach in the matter.

31. This Court is also surprised at the double standards applied by the Company Law Board to the similar application under Section 398 filed by the BSIDC against the private co-promoters which was dismissed on the ground of pendency of various court cases between the parties, orders issued by various Courts and action already taken and alternative remedies pursued in respect of matters on which prayers were made before them and that is why it found that it was not a fit case for intervention at that stage by using the discretionary power under Section 398 of the Companies Act, yet under the same set of circumstances, it has exercised its discretionary power to hear the petition under Section 398 filed by the front-men of the co-promoters against whom serious allegations were in existence.

32. Moreover, the petitioners before it having failed to show their bona fides in the matter the application ought not to

have been entertained on that sole ground, apart from the fact that they had completely failed to establish that they were genuine holders of 1/10th share of the company.

33. The findings regarding the existence of so called share certificates produced on behalf of respondent nos. 2 to 5 also ought not to have been accepted by the CLB in view of the serious allegations that there were hundreds of signed blank share certificates in existence from the time when the company was under the control of private co-promoters. This should have been reason enough for the CLB to have directed the petitioners to first approach the proper forum for correcting the register of members.

34. Thus, on a consideration of the entire facts and circumstances of the case, I find that the impugned order dated 30.4.1998 of the Company Law Board is fit to be quashed and set aside. It is accordingly quashed and set aside. The appeal is thus allowed.

PATNA HIGH COURT **(Ramesh Kumar Datta, J.)**
Dated 30th April, 2010
A.F.R/ S. Pandey